Supreme Court, U.S.
FILED
APR 24 1995
OFFICE OF THE CLERK

CASE NO. 94-1484

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROBERT W. HARTNAGEL,
Petitioner,

V.

GENERAL MOTORS CORPORATION,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY BRIEF

Robert W. Hartnagel,
Appellant
7605 Carta Valley Drive
Dallas, Texas 75248
Telephone: (214) 233 8090

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF CONTENTS..... i

REPLY TO RESPONDENT'S STATEMENT OF FACTS..... 2

REPLY ARGUMENTS..... 8

I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE A LONG-STANDING AND BROADLY-SIGNIFICANT CONSTITUTIONAL "SEPARATION OF POWERS" QUESTION DEALING WITH THE PROSPECTIVE APPLICATION OF THE CIVIL RIGHTS ACT OF 1991..... 8

II. THIS COURT SHOULD GRANT THE PETITION FOR THE PURPOSE OF ELIMINATING THE EXISTING UNCERTAINTIES REGARDING THE RESPECTIVE PLAINTIFF AND DEFENDANT DISPARATE IMPACT PROOF BURDENS WHICH WERE CREATED UPON ENACTMENT OF THE CIVIL RIGHTS ACT OF 1991..... 10

CONCLUSION..... 12

CASE NO. 94-1484

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROBERT W. HARTNAGEL,
Petitioner,

V.

GENERAL MOTORS CORPORATION,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY BRIEF

Respondent's Brief in Opposition incorrectly identifies the questions petitioner has presented for this Court's review; fails to respond to the Constitutional issues which have been raised; and presents an account of the events preceeding the filing of this lawsuit which is partially contradicted by documentary evidence introduced at trial. The suggestion that General Motors made an extensive effort to "retain" the plaintiff as an employee is thoroughly disingenuous.

REPLY TO RESPONDENT'S STATEMENT OF FACTS

By concluding plaintiff's appeal on an "Affirmance Without Opinion" basis, the Fifth Circuit has deprived this Court of the factual predicate necessary to permit a full consideration of the issues and conduct addressed in this lawsuit. The harm which results from this absence of predicate is compounded by the fact that, in a number of highly significant ways, respondent's account of these facts is in direct conflict with the official record of this proceeding. In response, the following statements are offered:

I. Adverse pattern of conduct: Within its corporate and divisional Public Relations Staff operating units, respondent General Motors has used certain legitimate and appropriate aspects of its Affirmative Action programs as a smokescreen and a shield for accomplishing entirely unrelated company-wide cost-reduction objectives. In persuit of this end, older, mid-management, male Public Relations employees have been systematically displaced in order to accommodate a grossly disproportionate level of hiring and internal transfers of female

employees into lesser-paying Public Relations positions, instead of providing equitably apportioned opportunities for female advancement into high potential professional and technical career paths in other areas of the company. (A comprehensive description of this practice is presented in Exhibit 8 to Brief of Appellant, filed on June 18, 1993. Documentary evidence supporting this assertion is included in the Fifth Circuit Supplemental Record on Appeal, under the docket entry dated August 26, 1993.)

An official company document introduced at trial quotes the remarks of a Vice President in charge of plaintiff's operating unit who--concurrent with the start of a major downsizing program applicable to its public relations units--stated as follows,

> "I know that General Motors Public Relations stands right at the top of the list in hiring minority and female staffers, and that is important to the corporation, because there are many jobs where minorities and females are not yet at the level of experience where they can get into the top jobs in other areas. That's not true in Public Relations. We have to carry the burden for the corporation in this respect..."
>
> "And you know, you always think, "Gosh, who will replace old Joe?" But there

> is always somebody better coming up. Our job is to find that person and get him or her into that job."

Testimony and documentary evidence introduced at trial established that General Motors subsequently consolidated 12 of its regional operating units into 5 surviving regional offices. Within the 1986-89 temporal limitation period established by the district court--which followed plaintiff's displacement from a regional assignment--female representation in this work group increased from 14 to 40 percent, while total employment was reduced by 52 percent. During the same time period, females accounted for 16 percent of comparable salaried positions on a corporation-wide basis.

In accomplishing this redistribution of regional jobs, General Motors took the position that, when the operations of two formerly separate units were merged, one of the units had been "closed" and the jobs in that unit "eliminated", while the ongoing functions of both regional operations were assigned to the employees of the surviving office.

Despite a written assurance that employees

by an express promise of Job--repeat JOB, as opposed to EMPLOYMENT--security based on comparative length of service in ANY reduction in force situation, General Motors has disavowed any responsibility for honoring plaintiff's request to retain a position in the newly-formed unit which assumed his job responsibilities.

One day after the "closing" of plaintiff's former territory, an entirely new position was created in the newly-formed office which took over his former duties for the specific purpose of accommodating the transfer into this unit of another lesser-service employee at exactly the same level of responsibility.

II. Circumstances of termination: The "Statement of Facts" presented in respondent's Brief in Opposition recites the elements of a five-year General Motors pre-trial legal defense strategy initiated at the point of plaintiff's displacement from active employment in November, 1986.

Throughout the time these events were occurring, plaintiff's wife was attempting to

cope with severe vision, mobility and emotional limitations resulting from a 71-day hospitalization following a series of massive strokes. Continuing in the requested regional capacity--solely on a greater length of service basis--would have permitted Mrs. Hartnagel to retain a well-established support system of family and close personal relationships, and maintained the potential for eventually making a gradual transition to another city. The employment alternative provided by General Motors called for permanent relocation to a climate which would have dramatically restricted her mobility, away from familiar circumstances and without an established personal support group--or termination of plaintiff's employment at age 49 on a cash buyout basis (equivalent to separation pay) with medical coverage halted after six months.

Despite respondent's alleged desire to "retain" the plaintiff as an employee, trial documents establish that <u>four days</u> after plaintiff initiated an "Open Door" inquiry regarding his displacement from a position in General Motors' regional organization, a

meeting was held by Public Relations Staff management, with a corporate Personnel representative in attendance. A memorandum describing this meeting stated,

> "At the conclusion of this meeting, it was decided that arrangements would be made for Mr. Hartnagel to talk to an outplacement specialist."

A transcript of a tape recorded conversation with the Manager of General Motors Central Office Personnel Administration more than a year later included the following exchange:

> Plaintiff: "I think we agree on the impracticality of what has been proposed to me. To be candid with you, this thing has been structured so I had no other choice but to take the buyout."
>
> Personnel Manager: "I know. That's where I came in. And I disagreed with it."

Plaintiff did not "accept" the alleged offer of re-employment which occurred after he had been required to remain for two years on involuntary layoff status and more than three years after his reduction in force displacement had occurred. He reported under protest in the belief that this lawsuit would be brought to trial just three months thereafter. Instead,

this case was referred to mediation where it remained for a period of 12-months, while the personal expense and hardship of maintaining a second residence/commute relationship between Dallas and Detroit continued. The case was released from mediation eight days after plaintiff's employment was terminated.

To accomplish this termination, General Motors made a prohibited unilateral modification to the stated compensation and calendar-month-only specifications of the same basic employment contract which respondent now claims as an inviolate shield against having to honor its own express promise of job security.

REPLY ARGUMENTS

I. This Court should grant the Petition to resolve a long-standing and broadly-significant Constitutional "Separation of Powers" question dealing with the prospective application of the Civil Rights Act of 1991.

Contrary to respondent's assertion, this petition does not request this Court's consideration of the retroactive application of Section 105 of the Act. The only retroactivity issue identified in this petition is whether, with respect to the post-Act trial of a pre-Act lawsuit, a Wards Cove-based disparate impact

proof formulation may be given continued retroactive effect after Congress has enacted legislation which reinstates the procedural burden of proof standard which existed at the point this lawsuit was filed and when the conduct upon which it was based was taking place.

Page 2 of respondent's brief states that Section 105 of the Act is entitled "Disparate impact as a basis of practice". The correct title for this section is "BURDEN OF PROOF IN DISPARATE IMPACT CASES". The brief also incorrectly substitutes the word "subchapter" for the word "title" in paragraph (k)(1)(A). The error is noteworthy because the term "title" in this context refers to the Act in its totality, thereby specifically confirming that Congress intended Section 105 to "provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964." Upon enactment of this statute, the procedural proof standard set forth in Section 105 should have become immediately effective on a prospective basis in subsequent trials wherein this application did

not have the effect of imposing a "new duty" on a "transaction already completed".

II. This Court should grant the petition for the purpose of eliminating the existing uncertainties regarding the respective plaintiff and defendant proof burdens which were established upon enactment of the Civil Rights Act of 1991.

A facially neutral employment practice which is applied within the context of a reduction in force involving the merger of two formerly separate operations by transfering all ongoing job functions to one of the merged units (without regard to the respective lengths of service of affected employees), while maintaining that the jobs of employees in the "closed" unit have been "eliminated", clearly presents the potential for producing an adverse impact based on protected age or gender characteristics.

Unlike the multiple selection criteria which can potentially influence an employer's individual hiring or promotion determinations, establishing a direct causal nexus between an identified age or gender-related disparity under this particular reduction in force practice is a rather straightforward

mathematical exercise. Such a relationship is unaffected by any consideration of applicant flow, relevant labor market, individual qualifications or characteristics, and is not dependant upon statistical samples or probabilities.

Under this practice, when an existing position was eliminated in a merger of regional Public Relations operating units, the change was based solely on a geographical "selection criteria". Any subsequent reassignment of a displaced employee following his elimination from the work group on this basis would become a matter for disparate treatment rather than disparate impact analysis, or for examination in the context of the defendant's rebuttal to a successful prima facie case demonstration.

For purposes of establishing a "rebuttable presumption" of discriminatory disparate impact, a plaintiff would meet his burden by identifying a facially neutral practice, direct causal nexus and substantially adverse impact within a relevant work group on the basis of protected age or gender criteria. Based on the evidence, testimony and pre-trial pleadings in

this case, plaintiff clearly met every required element of the assigned burden at trial, and supported this showing with a proof demonstration which was more than an adequate to satisfy the disparate impact prima facie burden applicable to the identified reduction in force practice. Moreover, this burden was met despite the extremely limiting effect of the 325-day evidentiary time frame requirement which is described elsewhere in this petition.

Precisely what the defendant's specific proof responsibility was <u>following</u> this demonstration forms the <u>pivotal consideration</u> and still unaddressed uncertainty underlying the question which has been posed in this petition and raised--so far without resolution--in this appeal. Plaintiff's lawsuit cannot be equitably concluded without a definitive response by this Court to the questions petitioner has presented.

CONCLUSION

The cumulative adverse effect of the district court error identified in this appeal was highly prejudicial to the plaintiff's case presentation at trial and deprived the jury of

the factual predicate needed to permit an informed judgement on the issues of this lawsuit.

For the reasons which herein presented, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert W. Hartnagel
Appellant
7605 Carta Valley Drive
Dallas, Texas 75248
Telephone: (214) 233-8090

April 20, 1995